ORIGINAL

FILED

AUG 23 2002

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 02-144

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

V.

VUTHY SENG,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent in the above-entitled case moves that the Court allow him to proceed in forma pauperis, pursuant to 28 U.S.C. §1915(a). Respondent has previously been granted leave to proceed in forma pauperis in the Massachusetts Superior Court and the Massachusetts Supreme Judicial Court. Respondent's affidavit in support of this motion is attached hereto.

VUTHY SENG

By his attorney,

Brownlow M. Speer
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street
Boston, Massachusetts 02108
(617) 482-6212

Counsel of Record for the Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 02-144

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

V.

VUTHY SENG,
Respondent

RESPONDENT'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Vuthy Seng, am the respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes _____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

JULY 1992 - $800 A MONTH

NO. 02-144

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

V.

VUTHY SENG,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BROWNLOW M. SPEER

COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street
Boston, Massachusetts 02108
(617) 482-6212

Counsel of Record for the Respondent

QUESTION PRESENTED

The respondent is dissatisfied with the statement of the "Question Presented" for review by the petitioner as being "[w]hether an inadequate recitation of the Miranda rights can be cured by a second proper recitation of those rights to permit a voluntary waiver of a defendant's Fifth Amendment rights?"

This case does not involve that question, because the Supreme Judicial Court of Massachusetts ("SJC") does not hold in this case that an inadequate recitation of the Miranda rights cannot be cured by a second proper recitation of those rights. On the contrary, it indicates in the margin of its opinion that subsequent correct recitations of Miranda rights can cure an inadequate first recitation. See Commonwealth v. Vuthy Seng, 436 Mass. 537, 546 n.6, 766 N.E.2d 492, 500 n.6 (2002) (App. 12-13). The SJC holds here that where the particular circumstances of the case are such that the defendant would be confused by the discrepancy or omission, a waiver so obtained is not voluntary. Id. at 547, 766 N.E.2d at 500 (App. 13). Accordingly, the "Question Presented" should properly be stated as follows:

> Whether, where two sets of Miranda warnings are given and one is defective or incomplete, and the circumstances are such that the defendant would be confused by the discrepancy or omission, a waiver so obtained is not voluntary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE..... 1

ARGUMENT

I. THIS CASE DOES NOT PRESENT ANY QUESTION LEFT OPEN BY THIS COURT IN DUCKWORTH V. EAGAN..... 4

II. THERE WAS NO CORRECTION OF THE RADICALLY DEFECTIVE MIRANDA WARNINGS ADMINISTERED TO THE DEFENDANT IN THE KHMER LANGUAGE..... 7

III. THE RULE APPLIED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT IN THIS CASE IS ENTIRELY IN KEEPING WITH THIS COURT'S MIRANDA JURISPRUDENCE..... 8

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

Colorado v. Spring,
479 U.S. 564 (1987) 9

Commonwealth v. Scott,
430 Mass. 351,
718 N.E.2d 1248 (1999) 6

Commonwealth v. Vuthy Seng,
436 Mass. 537,
766 N.E.2d 492 (2002) 2-4, 6-8

Duckworth v. Eagan,
492 U.S. 195 (1989) 4, 5, 6

Eagan v. Duckworth,
843 F.2d 1554 (7th Cir. 1988),
rev'd, 492 U.S. 195 (1989) 6

Fare v. Michael C.,
442 U.S. 707 (1979) 8

Miranda v. Arizona,
384 U.S. 436 (1966) 1, 3, 5-8

Moran v. Burbine,
475 U.S. 412 (1986) 9

Other Authority

2 W.R. LaFave & J.H. Israel,
Criminal Procedure §6.8(c) (2d ed. 1999) 7

STATEMENT OF THE CASE

The respondent is dissatisfied with portions of parts 2(B) and 2(C) of the petitioner's Statement of Facts, as follows:

In part 2(B), the petitioner asserts that the respondent "taught other Cambodians how to speak English...." (Petition for Writ of Certiorari [hereinafter "Petition"] 5) This implies a far greater competence in the English language than the respondent has been shown to possess, and is unsupported by anything in the motion judge's findings of fact or the record evidence. The closest the motion judge's findings come to this point is the finding that "there was evidence that defendant had in the past assisted another Cambodian in learning to speak English more clearly." (App. 39) That finding does not support the quoted statement in the petition for certiorari.

The respondent is also dissatisfied with part 2(B) because, although the petitioner concedes that the Khmer version of the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), was inaccurate (Petition 5), the petitioner omits to mention any of the ways in which the Khmer version was inaccurate. A reading of the opinion of the Massachusetts Supreme Judicial Court

("SJC") shows that there were numerous inaccuracies in the Khmer version which rendered it radically defective: (1) the respondent was not advised of his right to remain silent; (2) four of the warnings implied that he was obligated to answer the questions of the police if he was able to do so; (3) he was not advised that anything he said could be used against him in court; and (4) he was not informed that a lawyer would be appointed for him if he could not afford one, only that "they can help find one for you." Commonwealth v. Vuthy Seng, 436 Mass. 537, 544-545, 766 N.E.2d 492, 498-499 (2002) (App. 10-11).

In part 2(C) of the petition, the petitioner states that the inadequate Khmer warnings were immediately followed by proper warnings in English. (Petition 6) The petitioner then summarizes the SJC's conclusion as being

> that the discrepancies between the two sets of warnings would only serve to confuse Seng and render his statements involuntary for purposes of the Fifth Amendment. App. 13-15. In other words, the SJC found that repeating the warnings in English, albeit proper in content, essentially integrated the erroneous Khmer warnings into the English version. App. 15....
>
> (Petition 6 [emphasis added])

The petitioner's paraphrase of the SJC's conclusion materially distorts that conclusion. It does this by omitting the key fact which led the SJC to find that the discrepancy between the two sets of warnings was necessarily so confusing as to render impossible any knowing waiver of Miranda rights. The fact omitted by the petitioner is that, before administering the Miranda warnings in English, the Khmer-speaking officer told the respondent that what he was about to hear "in English ... [would be] essentially a repetition of what had just been stated in Khmer...." Commonwealth v. Vuthy Seng, 436 Mass. at 547, 766 N.E.2d at 500-501 (App. 15). The SJC stresses the centrality of this fact in its conclusion by reprinting in the margin of its opinion the pertinent line of questioning at the motion hearing in its entirety:

> DEFENSE COUNSEL: "Did you tell him, I'm going to read it to you in English now?"
>
> WITNESS [OFFICER TOUN]: "Yes, I did."
>
> DEFENSE COUNSEL: "Basically you told him that what you just read him in Khmer you're now going to read in English."
>
> WITNESS: "I'm going to read in English, correct."
>
> DEFENSE COUNSEL: "So, he's

> already heard--what you told him in English, he'd already heard in Khmer."
>
> WITNESS: "Right."
>
> DEFENSE COUNSEL: "And you told him that."
>
> WITNESS: "Yes, sir."

Commonwealth v. Vuthy Seng, 436 Mass. at 547 n.8, 766 N.E.2d at 500 n.8 (App. 14-15).

It was Officer Toun's anticipatory "[c]haracterizing" of the reading of the rights in English as essentially a repetition of what had just been stated in Khmer, not the English-language reading itself, which the SJC held to have "essentially integrated the erroneous Khmer warnings into the English version." Id. at 547, 766 N.E.2d at 500-501 (App. 15).

ARGUMENT

I.

THIS CASE DOES NOT PRESENT ANY QUESTION LEFT OPEN BY THIS COURT IN DUCKWORTH V. EAGAN.

The petitioner says in his first argument that "[i]n Duckworth v. Eagan, 492 U.S. 195 (1989), this Court had the opportunity to answer the question presented in this case" but "did not do so because it ruled for the State on different grounds." (Petition 7)

This is not so. The petitioner's claim rests on a misstatement of the holding of the United States Court of Appeals for the Seventh Circuit in the decision under review by this Court in Duckworth.

The petitioner recites the pertinent procedural history of the Duckworth case as follows:

> In Duckworth, the defendant was twice given his Miranda rights, but the first version stated that counsel will be appointed "if and when you go to court." Id. at 197. The defendant argued that the language of the Miranda rights administered to him was defective because it failed to provide a clear and unequivocal warning of the right to appointed counsel before interrogation. Id. at 199-200. The United States Court of Appeals for the Seventh Circuit agreed and concluded that the first inadequate warning could not be cured by a second proper warning. Id. at 200; 843 F.2d 1554, 1558 (CA7 1988). This Court granted certiorari, reversed and found that the first warning was adequate under Miranda. Duckworth v. Eagan, 492 U.S. at 205. That decision leaves open the question presented in this case.
>
> (Petition 7)

Contrary to the representation of the petitioner in the above-quoted passage from its petition for certiorari, the Seventh Circuit did not "conclude[] that the first inadequate warning could not be cured by

a second proper warning." As the opinion of this Court in Duckworth makes clear, the Seventh Circuit "thought it necessary to remand this case for consideration of whether respondent's second statement [made after a second proper statement of Miranda warnings, see 492 U.S. at 198-199] was tainted by the first warnings." Duckworth v. Eagan, 492 U.S. at 205. See also Eagan v. Duckworth, 843 F.2d 1554, 1558 (7th Cir. 1988), rev'd, 492 U.S. 195 (1989).

Just as the Seventh Circuit in Duckworth did not hold that "the first inadequate warning could not be cured by a second proper warning," the Massachusetts SJC did not so hold in this case. In the margin of its opinion, the SJC cites one of its prior decisions holding that subsequent correct recitations of Miranda rights cure an inadequate first recitation. Commonwealth v. Vuthy Seng, 436 Mass. at 546 n.6, 766 N.E.2d at 500 n.6 (App. 12-13), citing Commonwealth v. Scott, 430 Mass. 351, 354, 718 N.E.2d 1248 (1999). In another locus in the margin, the SJC essentially adopts the opinion of two noted scholars of the criminal law that a complete second warning ordinarily suffices to cure an inadequate first warning, with the qualification that "if the conflict between the two is such that the

suspect would be confused by the discrepancy, then a contrary result is necessary." Commonwealth v. Vuthy Seng, 436 Mass. at 547 n.7, 766 N.E.2d at 500 n.7 (emphasis omitted) (App. 14), quoting from 2 W.R. LaFave & J.H. Israel, Criminal Procedure §6.8(c) (2d ed. 1999).

II.

THERE WAS NO CORRECTION OF THE RADICALLY DEFECTIVE MIRANDA WARNINGS ADMINISTERED TO THE DEFENDANT IN THE KHMER LANGUAGE.

The petitioner complains in its second argument that "[e]ffective law enforcement should not have to suffer when, in the absence of bad faith, a suspect is improperly advised of his rights and that error is immediately corrected." (Petition 8) This complaint ignores the fact that the SJC's opinion in this case turns on the indisputable fact that the error was not corrected. On the contrary, it was "reinforc[ed]" by "the officer's indication that he was going to repeat in English what had already been said in Khmer...." Commonwealth v. Vuthy Seng, 436 Mass. at 547-548, 766 N.E.2d at 501 (App. 15).

III.

THE RULE APPLIED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT IN THIS CASE IS ENTIRELY IN KEEPING WITH THIS COURT'S MIRANDA JURISPRUDENCE.

The petitioner insists in its third argument that "[b]y finding that an inadequate recitation of the Miranda rights cannot be cured by a second proper recitation of those rights, the SJC created an unnecessarily rigid and mechanistic rule." (Petition 8) However, as already pointed out in part I of this Argument, ante, the SJC did not make any such finding, but rather stated the reverse of that proposition in the margin of its opinion. See Commonwealth v. Vuthy Seng, 436 Mass. at 546 n.6, 766 N.E.2d at 500 n.6 (App. 12-13).

The rule applied by the SJC in this case is neither "rigid" nor "mechanistic," but rather is entirely fact-specific. It is "that where two sets of warnings are given and one is defective or incomplete and the circumstances are such that the defendant would be confused by the discrepancy or omission, a waiver so obtained is not voluntary." Commonwealth v. Vuthy Seng, 436 Mass. at 547, 766 N.E.2d at 500 (App. 13). This rule is simply an application of the "totality of the circumstances" test for a knowing waiver mandated by such cases as Fare v. Michael C., 442 U.S. 707, 724-

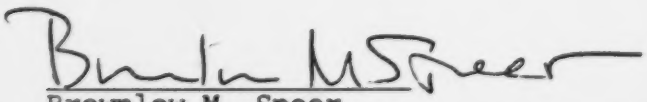
725 (1979), Moran v. Burbine, 475 U.S. 412, 421 (1986), and Colorado v. Spring, 479 U.S. 564, 573 (1987).

In its concluding footnote, the petitioner characterizes respondent as a person who "teach[es]" English. (Petition 10) As already pointed out in the Statement of the Case, ante, this characterization greatly overstates the respondent's competence in English and is unsupported by anything in the motion judge's findings of fact or the record evidence. This characterization is an impermissible inflation of the motion judge's finding that "there was evidence that defendant had in the past assisted another Cambodian in learning to speak English more clearly." (App. 39).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



Brownlow M. Speer
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street
Boston, Massachusetts 02108
(617) 482-6212

Counsel of Record for Respondent

Dated: August 23, 2002.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes _____ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes _____ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 21, 2002.

Vuthy Seng

Vuthy Seng